

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Mailing

77-1476

To be argued by
MARILYN GAINY BARNES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1476

B P/S

UNITED STATES OF AMERICA,

—against—

MANUEL FERNANDEZ,

Appellee,

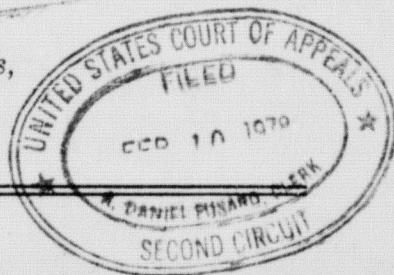
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

MARY MCGOWAN DAVIS,
MARILYN GAINY BARNES,
*Assistant United States Attorneys,
(Of Counsel).*



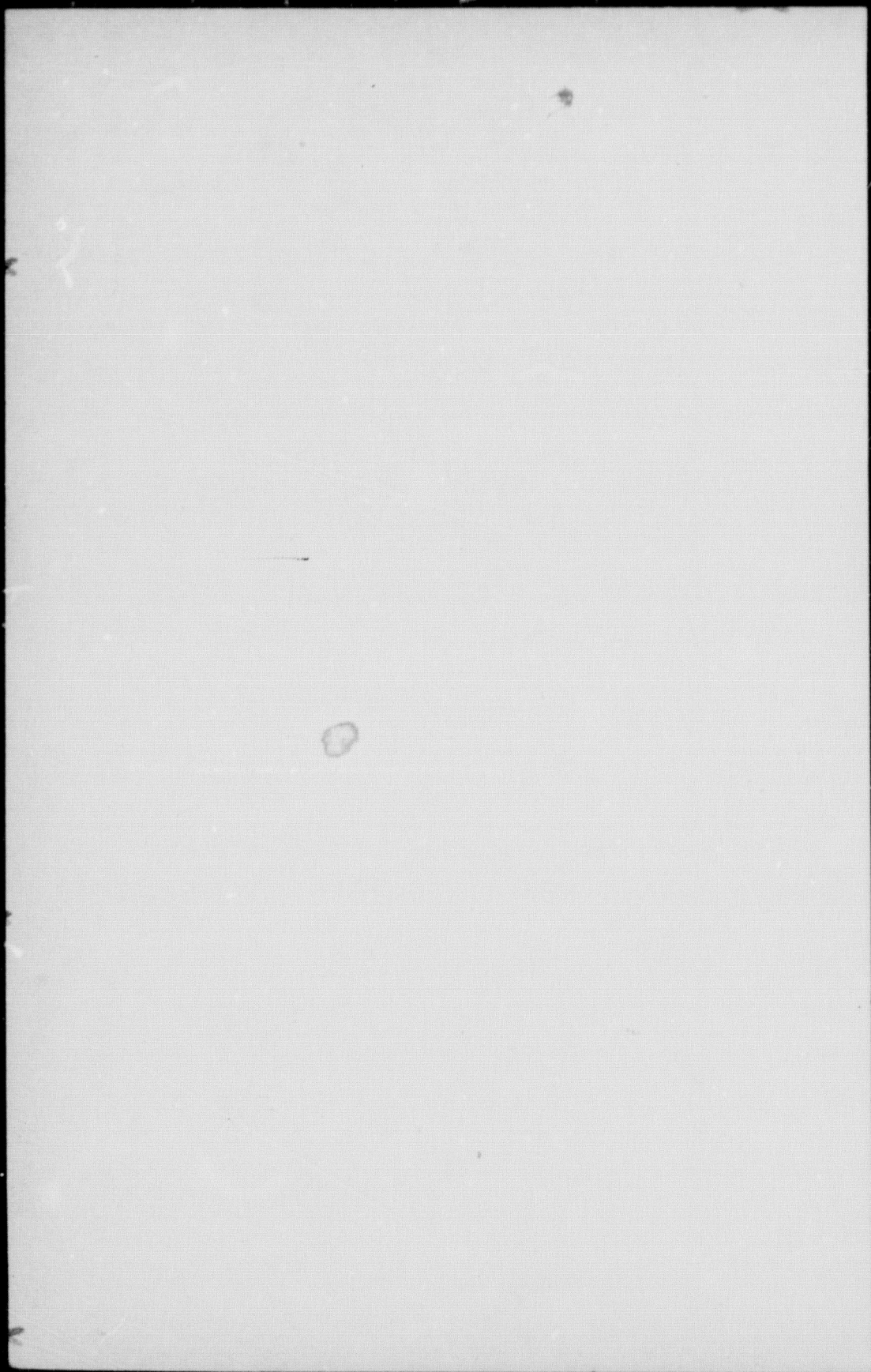


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1476

UNITED STATES OF AMERICA,

Appellee,

—against—

MANUEL FERNANDEZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Manuel Fernandez appeals from a judgment of the United States District Court for the Eastern District of New York (Costantino, J.) entered on October 25, 1977, convicting him, after a four day jury trial, of interstate transportation of stolen property, receipt of stolen property transported in interstate commerce, and conspiracy, in violation of Title 18, United States Code, Sections 2314, 2315, 371, and 2. Fernandez was sentenced to a term of five years imprisonment, all but thirty-two weekends of which was suspended, and was placed on probation for the balance of the sentence. Fernandez is free on bail pending the appeal.

On May 5, 1977, two days after the conclusion of trial, Fernandez moved for an order and judgment of acquittal, or, in the alternative, a new trial pursuant to Rule 29, F. R. Crim. P., on the grounds that (1) the trial

court's denial of his request for the services of a court-appointed Spanish interpreter during the trial denied him the effective assistance of counsel, and (2) the Government had failed to furnish counsel with *Brady* material. That motion was denied by the district court and Fernandez now raises these same issues on appeal.

Statement of Facts

A. Pre-trial Proceedings

On November 30, 1976, Fernandez was arraigned on a three count indictment charging him and four co-defendants, Barry Miller, Charles Johnson, Jose Garcia and Joseph Schnitzer,¹ with transportation of stolen property in interstate commerce, receipt of stolen property transported in interstate commerce, and conspiracy, in violation of Title 18, United States Code, Sections 2314, 2315, 371 and 2. Subsequent to Fernandez's arraignment on the indictment, his attorney, during informal discovery proceedings, made a general request for *Brady* material. The Government represented to counsel that it was not in possession of any exculpatory material as defined in *Brady v. Maryland*, 373 U.S. 83 (1963), continued that representation throughout the trial proceedings, and maintains that position on appeal.

¹ Charles Johnson has never been apprehended and remains a fugitive to the present date. Jose Garcia was tried on these charges along with appellant and was acquitted on all counts. Barry Miller and Joseph Schnitzer pled guilty to Counts One and Three of the indictment, respectively, and were sentenced to probation.

A related indictment had been previously filed against three other participants in these same crimes, Vincent LaMorte, Anthony Ferrante, and Seymour Weinberger, all of whom pled guilty some months prior to appellant's trial. Vincent LaMorte cooperated with the Government and was the Government's chief witness at appellant's trial.

The jury selection for appellant's trial commenced on April 26, 1977. At that time counsel asked the Government to provide an interpreter for appellant, whose native tongue was Spanish. Without being directed to do so by the court, the Government voluntarily furnished Fernandez with the services of a Spanish interpreter, but upon observing that appellant, who was, after all, represented by retained counsel, made virtually no use of the interpreter's services (A211-212),² the Government declined to provide an interpreter for further proceedings (A3). Counsel thereafter made a request for the services of a court-appointed interpreter during trial. The court determined that Fernandez was sufficiently conversant with the English language to understand and participate in the proceedings and denied the request for an interpreter after the following colloquy took place among the court, appellant, and his attorney:

Mr. Gilman: Your Honor, two days ago when we were selecting this jury I asked the Court for an interpreter before, and the Court did furnish an interpreter, and I'm advised by the Government that because I am privately retained an interpreter will not be furnished.

I tell the Court now I believe the defendant, Manuel Fernandez cannot afford the services of an interpreter,³ and I say further that unless an

² The numerals in parentheses preceded by the letter "A" refer to pages in the Appellee's Appendix.

³ It should be noted that the trial court was only presented with the bald assertion by appellant's attorney, that it was the attorney's belief that appellant couldn't afford to hire an interpreter. Yet appellant appeared before the trial court represented by retained counsel. We submit that since an accused has no absolute right to court-appointed counsel without a showing of indigency, *Gideon v. Wainwright*, 372 U.S. 335 (1963), appellant here had no absolute right to a court-appointed interpreter unless he demonstrated his indigency.

interpreter is furnished I shall have some difficulty communicating with him, and he shall have some difficulty understanding the proceedings, and it will be highly prejudicial to him.

The Court: I already anticipated that and I was going to ask this defendant to stand before the Court and ask him questions . . . Now Mr. Fernandez, how long have you been in this country?

Defendant Fernandez: Maybe in 1965.

The Court: 1965. And what have you been doing since 1965?

Defendant Fernandez: Working.

The Court: What kind of work have you been doing?

Defendant Fernandez: Well, I work for the carpet.

The Court: And did you have any education? Did you go to any schools in America while you were here?

Defendant Fernandez: Well I went in the beginning a few——

The Court: You went to what?

Defendant Fernandez: In the beginning.

The Court: In the beginning you went a few months to school. What kind of school did you go to?

Defendant Fernandez: I went to me, in my house.

The Court: Well, was it a grammar school, a secondary school or a night high school?

Defendant Fernandez: No call the English, the second language or something.

The Court: English Secondary?

Defendant Fernandez: Yes.

The Court: In other words, you were taught the English language there?

Defendant Fernandez: Well, not very, very long.

The Court: In your job, did you talk Spanish or English with your fellow employees?

Defendant Fernandez: I know of no employees.

The Court: Well who did you work with?

Defendant Fernandez: I worked with some American people.

The Court: And you talked English to them, didn't you?

Defendant Fernandez: Well I haven't had time to understand.

The Court: He speaks a lot better English than my mother did.

Mr. Gilman: Unfortunately, your Honor was never in court——

The Court: At this time, the Court having interrogated the defendant, the Court finds that he speaks very, very well. He responded and understood the nature of the questions asked, and the Court will not permit him to have a Spanish interpreter at the expense of the Government.

Defendant Fernandez: Excuse me, your Honor. Sometimes I have to repeat. I have trouble to understanding.

The Court: Well, you will understand. We will make sure. If you don't understand tell your

lawyer, and then we will repeat it for you⁴ (A3-7).

Fernandez's conversance with the English language was evident during the trial from his often visible reaction to the testimony of the English speaking witnesses. The following colloquy, when Fernandez interrupted the Government's examination of a witness to challenge that witness's answer, is representative of his reaction to such testimony:

Q. [By Miss Gainey posing a question to a witness about whether appellant had signed Advise of Rights forms] Did he sign both of those forms?

A. Yes.

The Defendant Fernandez: What form?

The Court: Tell your defendant to keep quiet. Do not make statements in the courtroom. . .

Mr. Gilman [Outside the presence of the jury] I want to apologize. I hope your Honor has noted I tried throughout the trial to keep my hot-tempered Spanish client quiet.

The Court: I understand. He's not going to be penalized for it. But he's got to learn to keep quiet. I don't mind lawyers jumping up and down once in a while but I will not allow defendants to do that. Once that happens the lack of respect and dignity permeates the court and I won't permit it. . .

⁴ Although Fernandez did not always speak grammatically perfect English, his speech can hardly be classified as the "gibberish" his attorney now asserts it to have been [Appellant's Brief, p. 6]. Had Fernandez spoken gibberish, the court reporter would not have been able to transcribe his words and there would have been no transcript of those words for review by this Court.

Mr. Gilman: Do you understand that Mr. Fernandez?

The Defendant Fernandez: I am sorry, your Honor (A96-97).

B. The Government's Case

The Government's case at trial established, in pertinent part, the following facts:

Vincent LaMorte, a co-conspirator of appellant Fernandez, testified that he [LaMorte] had participated, along with four other individuals, in a robbery of Kahn's Oriental Rug Store in Princeton, New Jersey on May 6, 1976.⁵ A large quantity of antique Oriental rugs was stolen during the course of the robbery, and the rugs were subsequently transported from New Jersey to Brooklyn, New York (A27-41). Although Fernandez did not take part in the actual robbery, he had selected the victim store as the robbery target and had joined in the planning of the robbery. After the rugs were stolen, Fernandez was to provide buyers for these rugs and thereafter share in the proceeds from the sale of these items. (A31-38, A60).⁶

LaMorte further stated that appellant was a friend of Robert Kahn, the owner of the victim store, and that appellant knew the store's location and physical layout

⁵ The four other participants in the robbery were Barry Miller, Jose Garcia, Charles Johnson, and Anthony Ferrante.

⁶ LaMorte's testimony also established that Anthony Ferrante had organized the robbery crew after another co-conspirator, Joseph Schnitzer, had introduced Ferrante to appellant, who was to provide buyers for the stolen property. For his part in introducing Ferrante to Fernandez, Schnitzer was to receive a share of Fernandez's profit from the sale of the stolen merchandise (A31-38, A60).

(A36-38). Furthermore, during the planning of the robbery, Fernandez had advised LaMorte and the other members of the robbery crew that Kahn kept rugs in a safe and had warned them not to forget to take the rugs from the safe during the robbery. Finally, LaMorte asserted that the night before the robbery, Fernandez had taken Ferrante and Schnitzer to Kahn's store (A37).

Robert Kahn, the owner of the victim store, testified as to his acquaintance with appellant Fernandez and appellant's familiarity with Kahn's store. Kahn's testimony established that Kahn had done business with Fernandez and Fernandez's partner at Kahn's store in Princeton, New Jersey (A86). According to Kahn, Fernandez had last visited that store in the early part of 1974 (A88-89). Kahn also stated that Larry Forlano was a personal friend of his who also dealt in Oriental rugs, and that Larry Forlano and Fernandez knew one another. Kahn established that Forlano had frequented Kahn's store in 1976.⁷

⁷ We wish to point out the following strenuous objection by appellant's attorney to Kahn's testimony linking Forlano and Fernandez:

Q. [To Robert Kahn] Do you know an individual by the name of Larry Forlano.

A. Yes.

Mr. Gilman: I must object unless this is connected in some way. I doubt it.

Ms. Gainey: I do intend to connect it.

The Court: If you don't I will strike it.

Mr. Gilman: Will you be able to strike it from the minds of the jury? (A90)

This objection was made despite the fact that the basis for the question was readily apparent in statements that had been made by Fernandez to the F.B.I. (A 146) which had been furnished to counsel well in advance of trial wherein Fernandez had admitted that he had received information about Kahn's store and his inventory from Larry Forlano. We submit that

[Footnote continued on following page]

Special Agent Charles Boling of the Federal Bureau of Investigation testified as to various statements and admissions made to him by Fernandez. Included therein was a statement made by Fernandez on November 3, 1976, the date of Fernandez's arrest, wherein Fernandez stated he was acquainted with a Larry Forlano, whom he knew to be a friend of Robert Kahn's. Agent Boling recalled that Fernandez made the following statements about Forlano:

A. [By Agent Boling]: Yes, on that same date, November 3rd he [Fernandez] mentioned that Larry Forlano, F-O-R-L-A-N-O, was the owner of Lawrence Forlano Rugs on Madison Avenue. He had played a part in setting up the theft of Robert Kahn's rugs. He mentioned that Forlano was a partner of Shamash and that also he [Forlano] was a very good friend of Kahn. That is Robert Kahn. And they both knew all the merchandise Mr. Kahn had at his store and Forlano had been in Kahn's shop on numerous occasions and was always speaking of his inventory.

Q. Whose inventory?

A. Of Mr. Kahn's inventory (A146).

Finally, Agent Boling testified that Fernandez had also admitted knowing both Joseph Schnitzer and Anthony Ferrante and had made the following statements concerning Schnitzer and Ferrante:

counsel attempted to forestall Kahn's testimony linking Forlano with Fernandez in order to prevent the jury from drawing the obvious inference that even if Fernandez had not been in Kahn's store since 1974, he was aware that Kahn kept rugs in the store's safe in 1976 because of information he had received from Forlano.

A. [By Agent Boling]: Yes, at that time, Mr. Fernandez stated that he had not taken any rugs from the premises of Robert Kahn's Rug Store in New Jersey. However, approximately six months ago he had accompanied two men to Brooklyn for the purpose of appraising rugs and that he had later determined them to be stolen from the store owned by Robert Kahn. He recalled that six months ago he received a telephone call from Joe Schnitzer and Tony Ferrante who asked him to act as an appraiser for some rugs so they wouldn't be cheated in the sale of these rugs. He mentioned he drove in an old blue car driven by Schnitzer and accompanied by Ferrante to Brooklyn somewhere near the Brooklyn Bridge. He recalled that the rugs were contained in the rear of a truck parked somewhere near the bridge and the truck had a name of a carpet company on it. He recalled that he looked at the rugs sometime during the morning hours and there were approximately 48 rugs rolled up in the rear of a truck.

Q. Did he mention whether or not anyone else was present at this location besides himself, Tony Ferrante and Joe Schnitzer?

A. Yes, he mentioned also present was Tommy Anavim. And advised that the rugs were worth between 30,000-40,000, and no one in the truck or at the truck opened the rugs for him to inspect. He further mentioned that Ferrante was attempting to sell the rugs to Tommy Anavim^{*} and that he again stressed his pres-

^{*} It was developed through the testimony of Robert Kahn that Tommy Anavim had been found in possession of some of the rugs stolen from Kahn's store during the May 6, 1976 robbery and had subsequently been arrested (A75-76).

ence was merely to act as an appraiser of these rugs which he thought were hot, but emphasized he did not participate in any theft of them . . . (A143-144).

C. The Defense Case

At the end of the Government's case, counsel made a motion to preclude the Government from questioning Fernandez on a prior conviction, if and when Fernandez chose to testify in his own defense. A hearing was held on that issue, and Fernandez testified in English at that hearing, without the aid of an interpreter, in direct response to counsel's questions (A148-152). The following excerpt from Fernandez's testimony at that hearing is representative of Fernandez's conversance with the English language and his ability to convey his thoughts in that language:

By Mr. Gilman: Manuel Fernandez?

A. Yes.

Q. Approximately five years ago you pleaded guilty to a crime, did you not?

A. Yes.

Q. What date was that, if you remember?

A. I don't remember very well.

Q. How long ago was it?

A. About six years now.

Q. Six years?

A. Yes.

Q. Where was it you pleaded guilty?

A. I pleaded guilty in Kew Gardens Court in Queens. (A149).

Fernandez's motion to preclude the Government from questioning him about his prior conviction was denied (A152), and Fernandez subsequently decided not to testify in his own behalf or to call any witnesses. Fernandez's defense relied chiefly upon the impeachment of the Government's accomplice witness and Fernandez's non-participation in the actual robbery and transportation of the stolen rugs.

ARGUMENT

POINT I

The court did not abuse its discretion by not appointing an interpreter for appellant.

Fernandez's attorney contends on this appeal that he was unable, throughout the entire trial, to communicate with his client, whose native tongue is Spanish; therefore, the trial court's refusal to appoint an interpreter for appellant denied appellant the effective assistance of counsel. It is the Government's position that the court properly exercised its discretion in not appointing an interpreter for Fernandez upon its finding that he understood and spoke English well enough not to require the services of an interpreter.

There is no constitutional right, as such, requiring the assistance of a court-appointed interpreter to supplement an accused's right to counsel. *Perovich v. United States*, 205 U.S. 86 (1907); *United States v. Desist*, 384 F.2d 889, 902 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1968); *Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965). However, the courts have recognized that where the defendant in a criminal proceeding is so unfamiliar with the English language that he cannot communicate his statements or testimony or cannot understand the testimony of others involved in the proceedings, he is entitled, as a

matter of due process and under the confrontation clause of the Sixth Amendment, to be furnished with the assistance of an interpreter. *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970); *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676 (D.C. Pa. 1973).⁹

The courts follow the general rule that the appointment of an interpreter is a matter resting within the sound discretion of the trial court, whose determination will not be disturbed where the record discloses no abuse of discretion. *Perovich v. United States*, *supra*, 205 U.S. at 86; *United States v. Desist*, *supra*, 384 F.2d at 889; *United States v. Sosa*, 379 F.2d 525 (7th Cir.), *cert. denied*, 389 U.S. 845 (1967); *Suarez v. United States*, 309 F.2d 709 (5th Cir. 1962).¹⁰ The trial court does not abuse its discretion by failing to appoint an interpreter where the court determines that the foreign-speaking accused is sufficiently conversant with the English lan-

⁹ It should be noted that in the above-cited cases holding that the defendant had a right to a court-appointed interpreter on due process and Sixth Amendment grounds, two elements were present, i.e. (1) the defendant was indigent and (2) the defendant unquestionably could neither speak nor understand English. Neither of these factors is present in the instant case. Appellant Fernandez was represented by retained counsel, and there was no showing made of his inability to engage an interpreter, other than his attorney's bald assertion that he believed appellant couldn't afford one (A3). In any event, whether or not appellant could or could not afford to hire an interpreter is not the issue, since based on the court's observations and direct contact with appellant, it was determined that appellant understood and spoke English.

¹⁰ Under the Federal Rules of Criminal Procedure, the appointment of an interpreter is likewise left to the trial court's discretion. Rule 28(b) simply provides that:

The Court *may* appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter [Emphasis Supplied].

guage to understand and participate in the proceedings. *Perovich v. United States*, *supra*, 205 U.S. at 91; *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974). See also *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *United States v. Barrios*, 457 F.2d 680, 682 (9th Cir. 1972); *United States v. Smith*, 464 F.2d 194 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972); *United States v. Rodriguez*, 424 F.2d 205, 206 (4th Cir.), *cert. denied*, 400 U.S. 841 (1970). As was aptly stated in *United States v. Carrion*, *supra*, 488 F.2d at 14-15:

Because the determination [whether to appoint an interpreter] is likely to hinge upon various factors, including the complexity of the issues and testimony presented during the trial and the language ability of the defendant's counsel, considerations of judicial economy would dictate that the trial court, coming into direct contact with the defendant, be granted wide discretion in determining whether an interpreter is necessary [Citations omitted].

We submit that a reading of a sterile record before an appellate court is no substitute for the trial court's direct contact with and personal observations of a defendant's ability to understand and converse in the English language.

Furthermore, the district court's determination of the defendant's ability to speak and understand English need not involve an elaborate process. "Normally the court should be able to decide whether interpreters are necessary by questioning and observing the defendant." Chang & Arango, *Interpreters for the Defense*, 63 California L. Rev. 801 (May 1975). In the instant case, the trial court had the benefit of personally speaking to and questioning appellant. (A5-7). During the course of the

court's colloquy with Fernandez it was determined that he had been in the United States some twelve years, had studied English briefly and that he worked with Americans. (A5-7). Moreover, the court's decision not to appoint an interpreter for appellant was also based, in part, upon the trial court's personal observations of Fernandez's conduct before questioning him, and the court made the following statement about those observations:

The Court: [I]t's this Court's impression that he [Fernandez] has a fairly good working knowledge of the English language. You have been before me before. You know how I operate.

My eyes are all over. I may look like I'm not looking, but you can bet your life nothing gets by me, and I think that that gentleman understands what we are saying here. . .

Mr. Gilman: Maybe your Honor doesn't understand what I said. I can't communicate with him because I don't understand him.

The Court: Well, we will find that out, too. I think you can communicate with him, and I think he knows what's going on. . .

(A3-4)

Fernandez argues that even if he could understand and speak English, counsel was unable to effectively represent him because "counsel at no time during the trial could understand what the defendant was trying to say to him" (Appellant's Brief p. 7). The reality of what occurred during the course of the jury selection and the trial belies that contention. For example, during the selection of the jury Fernandez was furnished with an interpreter. Yet little, if any, use was made of her services by Fernandez or his attorney. In an affidavit in support of the Government's Memorandum in Opposition to Defendant's Motion for a New Trial, the interpreter made the following statements about her services to appellant:

3. That during the selection of the jury in the above-captioned case she translated very little of the proceedings into Spanish for the defendant Fernandez because the defendant indicated to her that he understood the proceedings in English and for the most part he did not require her services.

4. That during the jury selection in the above-captioned case the defendant at times conversed with his attorney in English and at no time was she ever called upon by either the defendant or his attorney to translate conversations between the two of them (A211-212) ¹¹

Furthermore, in the middle of trial Fernandez testified in English in response to questions posed by counsel during the course of a hearing (A148-152). The fact that Fernandez was able to communicate in English with his attorney during jury selection, and while testifying in the hearing, makes the argument that he was unable to do so during the trial patently frivolous.

In sum, where a defendant has some knowledge of English, as was the case here, and he is reasonably able to converse in English, it is within the discretionary power of the trial court to determine whether or not to appoint an interpreter. *Perovich v. United States*, *supra*, 205 U.S. at 89; *Suarez v. United States*, *supra*, 309 F.2d at 709. Although Fernandez did not always speak grammatically correct English, it is obvious from the record and the trial court's observations of appellant that the

¹¹ We wish to point out to the Court that Fernandez has never contested the statements of the interpreter. Similarly, he has never challenged the assertions made by the Government in the aforementioned memorandum that during the trial period, Fernandez communicated in English not only to his attorney, but also to the Assistant United States Attorney, FBI agents, and his codefendant's attorney. (A207).

court did not abuse its discretion by concluding that Fernandez had sufficient command of the English language to understand the proceedings and adequately convey his thoughts.

POINT II

The undisclosed information was not *Brady* material and did not render LaMorte's testimony perjurious.

Fernandez alleges that the Government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) by deliberately failing to disclose, pursuant to counsel's pre-trial request for any *Brady* material, the fact that there was no safe in Kahn's Oriental Rug Store in 1974, i.e., during the period that Fernandez was last *known*¹²

¹² We emphasize the word "known" because 1974 refers to the last time, to Robert Kahn's knowledge, that Fernandez was at his store. The testimony of Vincent LaMorte revealed that Fernandez had visited the victim store on the night prior to the robbery. (A36-37) This testimony was taken only after strenuous objection by appellant's attorney:

Q. [By Miss Gainey to LaMorte] Did he state where the store was at, meaning Fernandez?

A. Yes. They had gone there prior to this meeting here, Tony Schnitzer and Manuel [Fernandez] had gone to the store.

Mr. Gilman: If your Honor please, ask it be stricken unless he was there.

Q. How do you know that they had gone there? [?]

A. Because the next day when Tony took us to the bar he knew exactly where he was going.

Mr. Gilman: I object and ask it be stricken.

The Court: Do you know of your own knowledge that they went there?

The Witness: Yes sir.

The Court: One of them told you?

[Footnote continued on following page]

to have visited that store. Fernandez arbitrarily concludes from the fact that there was no safe in those premises in 1974 that it would have been impossible for him to have been aware of its existence in 1976, and, therefore, that LaMorte committed perjury when he testified that Fernandez told him that Kahn kept rugs in the store's safe. It is the Government's position that this allegedly undisclosed information was neither exculpatory as defined by *Brady v. Maryland, supra*, 373 U.S. 83, nor was it inconsistent with LaMorte's testimony so as to render that testimony perjurious.

LaMorte's one and only reference to what Fernandez said concerning the safe reads as follows:

Q. [To LaMorte] And did Fernandez tell Ferrante what the location [of the robbery] was to be?

A. Yes. He explained the whole thing, and even had a little paper where the location of the rugs would be located in the store, and mainly not to forget to take the rugs that were in the safe. (A36).

There is no statement in that testimony that Fernandez ever told LaMorte he had seen the safe or that Fernandez had made a diagram of the safe, and appellant's

The Witness: That night I was supposed go, but I didn't go with them. They went themselves.

Mr. Gilman: I ask that it be stricken.

The Court: No I'll allow it.

Mr. Gilman: Did your Honor strike it?

The Court: No I'll allow it (A36-37).

We submit that this strenuous objection was an attempt by counsel to forestall the jury from drawing the reasonable inference that another manner in which appellant may have gained knowledge of the safe was from his visit to the store on the night prior to the robbery.

assertion to the contrary is a gross distortion of La-Morte's testimony.

Appellant, in an attempt to bolster his claim that the information about the non-existence of the safe in 1974 constituted *Brady* material, urges that the existence of this safe was the central theme of the Government's case.¹³ In so urging, appellant has conveniently overlooked the following factors which establish the irrelevance of existence of the safe in 1974 to the Government's case and the non-exculpatory nature of such evidence under *Brady*: (1) Appellant Fernandez's admission of his familiarity with Kahn's store and his rug inventory through information received from Larry Forlano who had recently frequented those premises; (2) Fernandez's covert visit to Kahn's shop the night before the robbery and (3) Fernandez's own knowledge that there was no safe in Kahn's store in 1974.

In *Brady v. Maryland*, *supra*, 373 U.S. at 87, the Supreme Court held that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process where the evidence is material either

¹³ The record does not substantiate appellant's assertion that the safe was crucial to the Government's case. To begin with, appellant is in error when he states that the Government began the trial by emphasizing the safe in its opening. Not one reference is made to the safe in the Government's opening statement (A8-15). Furthermore, the record shows that the Government's entire summation consumed some thirty pages of transcript (A155-176, A177-186), yet less than one half of a page of that summation concerned the safe, and then only to point out that during the robbery LaMorte and the others had first taken the rugs from the safe as directed by Fernandez (A168-169). To credit appellant's assertion that the safe was the focal point of the prosecution's case, this Court would have to come to the absurd conclusion that the Government devoted only one half page of transcript to its theory of prosecution, and with those few lines swayed the outcome of the case.

to guilt or punishment, irrespective of the prosecutor's good or bad faith. The term "materiality" as used in *Brady* clearly describes evidence of greater value than that which is merely "favorable" to the accused, *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). It must be the type of evidence which "if made available would tend to exculpate him [the defendant] or reduce the penalty". *Brady v. Maryland*, *supra*, 373 U.S. at 87.

Under the case law following the *Brady* decision two general categories of material required to be turned over under the Brady rule have developed: (a) material which tends to be exculpatory and (b) material which may be used to impeach or discredit government witnesses. See, e.g., *Giles v. Maryland*, 386 U.S. 66 (1967); *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969). Thus, with respect to impeachment the Government must reveal promises of leniency or immunity for its witnesses, *Giglio v. United States*, *supra*, 405 U.S. 150; *United States v. Pfingst*, *supra*, 490 F.2d at 262. Likewise, the Government must disclose the prior criminal record or other prior material acts of misconduct of its witnesses. *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975); *United States v. Seijo*, 514 F.2d 1357 (2d Cir. 1975); *United States v. Fried*, 486 F.2d 201 (2d Cir. 1973), *cert. denied*, 416 U.S. 983 (1974).¹⁴

Since there is no contention that the undisclosed information complained of in the instant case falls into the category of impeachment evidence as outlined above,

¹⁴ In the instant case, the defense was provided with a wealth of impeachment material against LaMorte which it fully exploited before the jury, since LaMorte testified as an accomplice witness with several prior convictions and a receipt of immunity in other federal crimes.

the only question is whether this information was exculpatory. In *Moore v. Illinois*, 408 U.S. 786, 794 (1972), the Supreme Court restricted the Government's obligation of turning over *Brady* material to require only revelation of exculpatory material which is "material either to guilt or punishment". On this question of whether allegedly exculpatory evidence is material to guilt or punishment where, as in the instant case, only a general request for "all Brady material" is made, the Supreme Court stated in the recent case of *United States v. Agurs*, 427 U.S. 97, 107 (1976):

* * * If there is a duty to respond to a general request of that kind, it must derive from the *obviously exculpatory* character of certain evidence in the hands of the prosecutor. [Emphasis added]. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.

This Court in discussing *Agurs* made the following observation:

The thrust of *United States v. Agurs*, 427 U.S. 97 (1976) is that in the context of the entire record, the omitted evidence must raise a reasonable doubt as to the defendant's guilt. *United States v. Stassi*, 544 F.2d 579 (2d Cir. 1976).

To put it very simply, the Government is not required to disclose all its evidence, however insignificant, to the defense, nor is it required to disclose evidence which appears irrelevant. *United States v. Bowles*, 488 F.2d 1307, 1313 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 991 (1974).

Furthermore, it must be noted that the Government is not obliged under *Brady* to furnish the defendant with

information he already has or can with any reasonable diligence obtain himself. *United States v. Stewart*, 513 F.2d 957 (2d Cir. 1975); *Williams v. United States*, 503 F.2d 995 (2d Cir. 1974); *United States v. Brawer*, 496 F.2d 703 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States v. Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). As this Court pointed out in *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973):

The purpose of the Brady rule is not to provide the defendant with complete disclosure of all evidence in the government's file which might conceivably assist him in the preparation of his defense, but to assure he will not be denied access to exculpatory evidence known to the government but unknown to him.

Thus the concept of suppression as defined in *Brady* implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant would benefit from knowing. *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). See also *Giles v. Maryland*, *supra*, 386 U.S. at p. 96.

The undisclosed evidence complained of in the instant case does not fulfill any of the above-enumerated criteria, i.e. it is not exculpatory, it is not material to appellant's guilt or innocence, it does not impeach the credibility of a government witness, it does not raise a reasonable doubt as to appellant's guilt and finally, it was known to appellant. Whether or not Kahn's shop had a safe at the time of Fernandez's last known visit to that establishment is irrelevant to his knowledge that rugs were kept in the store's safe in 1976, particularly when viewed in relation to appellant's admission of receiving information about

those premises from Larry Forlano, who was a good friend of the owner of the store and had frequented the store during the period of time the safe was there. Moreover, the fact that there was no safe in Kahn's store in 1974 is totally irrelevant to Fernandez's aiding and abetting in the receipt of stolen property, since he admitted that he was present at the garage where the rugs were stored after the robbery for the purpose of appraising those rugs which he believed to be stolen. Finally, the lack of a safe in Kahn's store in 1974 was not inconsistent with LaMorte's testimony that Fernandez had selected that store as the robbery target and told LaMorte and the other conspirators that the rugs were kept in the safe. The thrust of LaMorte's testimony was the knowledge appellant Fernandez had of Kahn's shop and its inventory, not how and when Fernandez had acquired that information.¹⁵ Even if the jury had been aware that there was no safe in Kahn's shop in 1974, this would have in no way excluded the reasonable inference that Fernandez had learned from a third party that Kahn kept his rugs in the safe. Nor should the fact be overlooked that on the night prior to the robbery, Fernandez took Joseph Schnitzer and Anthony Ferrante to Kahn's store, although concededly there was no evidence presented as to what observations Fernandez made concerning that store on that occasion.

¹⁵ We suggest that the fact that there was no safe in Kahn's store in 1974 would have been of no more importance to the jury than the fact that Fernandez had last been at Kahn's shop to Kahn's knowledge in 1974 (A88-89). Counsel never presumed to make the pointless argument to the jury that Fernandez could not have been presently familiar with Kahn's merchandise, since Fernandez had not been in Kahn's store since 1974. Yet he now contends that the analogous argument that Fernandez could not have known of the goods in the safe because there was no safe there in 1974 would have created a reasonable doubt in the minds of the jurors.

Finally, Fernandez was unquestionably aware of the fact that there was no safe in Kahn's shop in 1974, even though counsel now attempts to convince this Court that he [counsel] was unaware of this fact at trial because he could not communicate with his client. The Government challenges whether we are in fact dealing with a question of lack of communication as opposed to one of post-conviction bootstrapping, in light of the fact that the instant trial spanned a period of seven days and LaMorte's testimony concerning the rugs in the safe was taken on the very first day of testimony. Thereafter, there was both a luncheon recess and an overnight adjournment in the trial before counsel completed his cross-examination of LaMorte (A40; A67). It seems incredible that during this entire seven day period, including periods of adjournment, that Fernandez was unable to make his attorney understand that there was no safe in the store in 1974. Yet, miraculously, immediately after the trial the communication barrier disappeared, and Fernandez was able to successfully communicate this fact to his attorney.¹⁶

Accordingly, the record is clear that, regardless of when or if Fernandez told counsel about the non-existence of the safe in 1974, the Government did not suppress information that was unknown to appellant.

¹⁶ We ask the Court to note that the instant trial ended about 9:15 P.M. on May 3, 1977, and by May 5, 1977, appellant had moved for a new trial before the district court on the grounds herein discussed. (Appellant's Appendix, pp. g-j)

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 6, 1978

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MARY MCGOWAN DAVIS
MARILYN GAINEY BARNES,
Assistant United States Attorneys,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 9th day of February 1978 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Samuel W. Gilman, Esq.

401 Broadway

New York, N.Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East,
Borough of Brooklyn, County
of Kings, City of New York.

Dolores M Byrd

Sworn to before me this

9th day of February 1978
Barbara Allen

BARRARA A. ALLEN
Notary Public, State of New York
No. 24-66824
Qualified in Kings County
Commission Expires March 30, 1979